INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	3
Specification of errors to be urged	7
Reasons for granting the writ	7
Conclusion	12

CITATIONS

Statutes:	
Act of June 13, 1934, c. 482, 48 Stat. 948 (40 U. S. C. 276b), Section 1	2
Bacon Davis Act, as amended, 46 Stat. 1494, 49 Stat. 1011, 54 Stat. 399 (40 U. S. C. 276a)	11
Miscellaneous:	
78 Cong. Rec. 10759	10
Hearings before a subcommittee of the Senate Committee on Commerce on S. Res. 74, 73d Cong., 2d Sess., Vol. 1, Pt. 5	9, 10, 11
Hearings before a subcommittee of the Senate Committee on Education and Labor on S. Res. 228, 73d Cong., 2d Sess., Pts. 1 and 2	10, 11
H. Rep. No. 1750, 73d Cong., 2d Sess	10
S. Rep. No. 803, 73d Cong., 2d Sess	10

29552—43

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK LAUDANI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, entered March 16, 1943 (R. 376), setting aside convictions for violations of the Act of June 13, 1934, and directing the District Court to quash the indictments.

OPINIONS BELOW

The majority (R. 367–374) and dissenting (R. 374–375) opinions in the Circuit Court of Appeals are not yet reported. The memorandum opinion of the District Court overruling petitioner's demurrer and motion to quash the indictments appears at R. 37–42.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 16, 1943 (R. 376), and a petition for rehearing (R. 379–390) was denied April 20, 1943 (R. 395). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The Kick-back Act prohibits inducing any person employed on a public work financed by the United States to give up any part of the compensation to which he is entitled under his contract of employment. The question presented is whether this prohibition applies to a foreman acting solely in his own interest, or whether it applies only to the employer and those acting in his behalf.

STATUTE INVOLVED

Section 1 of the Act of June 13, 1934 (c. 482, 48 Stat. 948, 40 U. S. C. 276b), commonly called the Kick-back Act, provides:

> whoever shall induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof, to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat

of procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

STATEMENT

Respondent and one Alfredo Rossi, together with several others, were charged in a series of indictments with violations of the Kick-back Act of June 13, 1934 (R. 20–26, 367). Except for differences in names of the defendants and allegations as to the names of victims, dates of the violations, and sums of money exacted, the counts of the indictments were couched in identical language (R. 21, 37). They alleged that between January 1, 1937, and May 15, 1938, there was under construction at Weehawken, New Jersey, certain public works known as the Weehawken Plaza connection of the Lincoln Tunnel under the Hudson River from New York to New Jersey; that the work was being constructed under a contract between the Port of New York Authority and George M. Brewster & Son, Inc., the general contractor, and a subcontract between the Brewster Company and the Cape Ann Granite Company for the furnishing and setting of granite rubble facing and coping necessary in the construction of the Weehawken Plaza connection; that all of this public work was being financed in part by grants from the United States; that respondent was foreman for the Cape Ann Granite Company, with author-

ity to employ and discharge stone cutters and masons, and knew that the rate of pay for such employees, as fixed and posted on the work, was a certain amount per hour and that these employees were entitled to receive the full posted rate of pay without deductions for any purpose; and that respondent and his co-defendants, by intimidation and threats of dismissal and by giving to understand that all persons employed on the work would be required to give the defendants parts of their true wages so long as they were so employed, induced certain named employees to surrender to them parts of the compensation to which the employees were entitled for work and labor on the public work (R. 21–26, 38–39).

The defendants filed a demurrer (R. 26–31) and motion to quash (R. 32–36) the indictments on the ground, *inter alia*, that it was not alleged that they were the employers of the victims, or that they were acting in behalf of the employer in inducing the victims to give up part of the compensation to which they were entitled.[1] The demurrer and motion to quash were overruled (R. 37–42).

The Government elected to proceed on five of the indictments, and, after a severance as to the defendants other than respondent and Rossi,

[1] This objection was renewed at the opening of the trial (R. 44–47), at the close of the Government's case (R. 207–208), and the conclusion of all the evidence (R. 273, 279), and in a motion in arrest of judgment (R. 319–320), and was in each instance overruled (R. 47, 208, 275, 280, 320).

these indictments were consolidated for trial (R. 47–49). Respondent was convicted on one or more of the counts in four of the indictments tried (R. 316–317),[2] and he was sentenced to nine months' imprisonment on each count, the sentences to run concurrently (R. 333).

The evidence in support of the allegations of the counts on which respondent was convicted may be summarized as follows:

In 1935 the Port of New York Authority undertook to construct, as part of the Lincoln Tunnel project, certain installations at the New Jersey approach, and the United States, through the Public Works Administration, granted $1,780,000 to the Authority to aid in financing these works (Ex. G. 5, R. 58; R. 75). Contracts for portions of the works were let by the Authority to George M. Brewster & Son, Inc. (Ex. G. 6, R. 59; Ex. G. 7, R. 60), and the latter, in turn, sublet to the Cape Ann Granite Company, Inc., contracts for furnishing and setting granite rubble facing and coping at the Weehawken, New Jersey, approach to the tunnel (Exs. G. 8, G. 9, R. 63). Pursuant to the requirements of Title II, Section 206 of the National Industrial Recovery Act (June 16,

[2] At the close of the trial the Government consented to the dismissal as to respondent of all three counts of indictment numbered 10C; and seventeen of the counts of the remaining four indictments (R. 276–279, 316–317). Nine counts were submitted to the jury, and respondent was convicted on each of these (R. 316–317, 332). The defendant Rossi was acquitted on the counts submitted as to him (R. 316–317).

1933, c. 90, 48 Stat. 195, 204–205, 40 U. S. C. 406) and regulations promulgated thereunder, both the prime and subcontracts (the latter by reference to the prime contracts (see Ex. G. 8, p. 4; Ex. G. 9, pp. 1, 3)) contained provisions fixing minimum wage rates for employees, and requiring that each employee be paid the full amount accrued to him without deductions or rebates and that a statement of all wage rates be posted at the site of the work (Ex. G. 6, pp. 44–45; Ex. G. 7, pp. 93–94).

As foreman for the Cape Ann Granite Company on the Weehawken approach, respondent had power to employ and discharge employees (R. 72, 234). The victims named in the counts on which respondent was convicted testified that they were hired by him (R. 83, 121, 133, 141) and that they "kicked back" to him directly or through other workers on the job from 25 to 35 cents of their wages for each hour of their employment (R. 84, 86, 87–88, 89, 90, 94, 104, 124–126, 129, 134–139, 142; see also R. 148, 152). The witnesses were compelled to make these payments as a condition of their obtaining and continuing their employment (R. 84–85, 87–88, 109, 134–135, 136). The Cape Ann Granite Company did not authorize these activities of respondent and knew nothing of them (R. 72–73; see also R. 242).

The court below reversed the convictions and remanded the cause with directions to quash the

indictments (R. 374) on the ground that the prohibitions of the Kick-back Act apply only to the employer and persons acting for or on his behalf and not to other persons not in privity of contract with the employer (R. 370). Circuit Judge Biggs dissented on this issue of statutory construction (R. 374).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the Kick-back Act is not applicable to a foreman having authority to employ and discharge employees, who, unknown to the employer, by threats of dismissal, forces employees under his supervision to give up to him part of the wages to which they are entitled under their contracts of employment.

2. In remanding the cause with directions to the District Court to quash the indictments.

REASONS FOR GRANTING THE WRIT

The decision below is the first decision of a circuit court of appeals construing the Kick-back

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The court below unanimously held (R. 373, 374) that the trial court committed reversible error in permitting the prosecutor to argue to the jury that respondent should have produced as witnesses the many employees of the Cape Ann Granite Company whom he was not charged with having subjected to extortion, so that they might testify that he had not exacted anything from them (R. 283-285). We do not here contend this holding of the court below as error; hence, if this Court should grant the petition and sustain our position on the question of statutory construction, the case should be remanded for a new trial.

Act. In limiting the prohibition of that Act so as to exclude its application to foremen, the court below, in a divided opinion, has rendered a decision of first importance in the enforcement of the statute. The decision, we believe, is not warranted by the statutory language, history, or purpose.

1. The language of the Kick-back Act is broadly phrased. In terms it applies to "whoever" forces employees on public works to give up any part of the wages to which they are entitled under their contracts of employment. The court below, however, emphasized the phrase "contract of employment" and reasoned that since only the employer is in privity of contract with the employee, only the employer can impair the employee's contractual right which the statute is designed to protect. We submit that that phrase serves only to identify the amount of wages which may not be subtracted by the forbidden means, and limits application to extortion connected with employment. It does not exclude persons such as foremen. To the contrary, the phrase "threat of procuring dismissal from such employment" in the statement of means whereby an employee is induced to give up part of his compensation, manifests a purpose to cover persons other than the employer, for the latter may directly dismiss the employee, rather than "procure" his dismissal. Certainly, if the statute extends to one who may *procure* the dismissal of an employee, it applies as well to one who, like respondent, is vested with authority to hire and fire and is therefore in a particularly advantageous

position to exact tribute from employees under his supervision.

2. The history of the statute evidences a purpose to apply to practices of foremen on public works. The statute resulted from hearings before a subcommittee of the Senate Committee on Commerce pursuant to S. Res. 74 (73d Cong., 2d Sess.) and before a subcommittee of the Senate Committee on Education and Labor pursuant to S. Res. 228 (73d Cong., 2d Sess.). At these hearings there was much evidence concerning the practices of contractors in forcing employees to return part of their compensation. In addition, however, witnesses testified concerning instances of foremen's extorting money from employees for the privilege of working. Thus, one witness told of how a foreman forced employees to buy tickets at $5.00 each for fictitious shore dinners (Hearings Before a Subcommittee of the Senate Committee on Commerce, *supra*, Vol. 1, Pt. 5, pp. 790–791). Another testified that every week, following pay day, he and his fellow employees were each compelled to kick back to their foreman 50 cents for each hour they worked (Hearings Before a Subcommittee of the Senate Committee on Education and Labor, *supra*, Pts. 1 and 2, pp. 341–342).[5] While the committee reports were very brief and did not advert directly to kick-back practices on the part of foremen,

[5] See also, *Id.*, pp. 152, 159, 333, 428; Hearings Before a Subcommittee of the Senate Committee on Commerce, *supra*, pp. 801, 811; cf. pp. 817–818.

the Senate Committee on the Judiciary, which reported the bill favorably, stated that "Hearings of the Senate Committee on Racketeering revealed that large sums of money have been extracted from the pockets of American labor, to enrich contractors, subcontractors, and their officials" (S. Rep. No. 803, 73d Cong., 2d Sess.; R. 359). In view of the evidence before the investigating committees that foremen were guilty of such abuses, it would seem that the Judiciary Committee's reference to "officials" included foremen, as well as higher company executives.[5] A further indication that Congress intended the statute to extend to foremen is found in the brief discussion of the bill on the floor of the House, when Chairman Sumners of the Judiciary Committe stated, in response to a direct inquiry, that it was intended to apply to abuses which were disclosed by the Senate committee of which Senator Walsh was the chairman (the subcommitee of the Senate Committee on Education and Labor) (78 Cong. Rec. 10759).

Moreover, contrary to the view of the majority of the court below that the construction for which

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[5] The report of the House Committee on the Judiciary referred only to "the so-called 'kick-back racket' by which a contractor on a Government project pays his laborers wages at the rate the Government requires him to pay them, but thereafter forces them to give back to him a part of the wages they have received" (H. Rep. No. 1750, 73d Cong., 2d Sess.; R. 360).

the Government contends should not be accepted because it would project the statute into fields already covered by state criminal laws, the hearings before the Senate committees show that they recognized that the proposed legislation would partially overlap state law.[6] In view of this and the broad language of the statute, the implication is clear that Congress intended to extend federal protection to workers theretofore protected only by state law in order to insure the effectuation of federal policy in respect of wages on public works.

3. The question involved, though novel, is one of large public importance for, as the majority opinion points out (R. 370–371), the statute applies alike to all public works for which the United States directly contracts and to federally aided works undertaken by other public bodies.[7] The decision below relieves from the prohibitions of the statute a large class of persons who, by reason of their position of authority, are able to force employees to "kick back" to them for their own enrichment a portion of the earnings to which the employees are entitled. To this extent the de-

[6] See Hearings Before a Subcommittee of the Senate Committee on Commerce, *supra*, at pp. 817–818; Hearings Before a Subcommittee of the Senate Committee on Education and Labor, *supra*, at pp. 23–24, 416–417.

[7] See Bacon-Davis Act, as amended, 46 Stat. 1494, 49 Stat. 1101, 54 Stat. 399, 4 U. S. C. 276a. See also S. Rep. No. 803, 73d Cong., 2d Sess.

cision frustrates the Congressional purpose to secure to employees on public works the full benefits of their labor.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

MAY 1943.

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